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IN THE MISSOURI SUPREME COURT

CHARZETTA STEELE,	)	
	)	
Appellant,	)	
	)	
vs.	)	Appeal No. SC92520
	)	
SHELTER MUTUAL INS. CO.,	)	
	)	
Respondent.	)	

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

Ms. Steele will begin where the insurance company ended. In its Brief, the insurance company concluded with "Appellant proposes that this Court reverse legal precedent that has stood for nearly 40 years." *Respondent's Substitute Brief* at 22. Why this statement is incorrect neatly summarizes the argument Ms. Steele makes here: relying on law decided before the implementation of the Motor Vehicle Financial Responsibility Law ("MVFRL") in 1987 is like relying on the Magna Carta to interpret the Missouri Constitution. Though interesting from an historical point of view, it can lead to the wrong result. *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. 2000), and particularly 548n9.

It bears repeating that the cases decided under the "old" law, cases such as *Waltz v. Cameron Mut. Ins. Co.*, 526 S.W.2d 340 (Mo. App. 1975), and *Hines v. Government Employees Insurance Company*, 656 S.W.2d 262 (Mo. banc 1983), were not decided either on the statute or public policy grounds, because at the time there was no mandatory liability insurance law, and hence no public policy. These cases were strictly decided on policy language, on the "freedom to contract," 656 S.W.2d at 265. There are only so many ways to say that this has not been the law since 1987.

To argue, then, as the insurance company does here, that the MVFRL did not "in any way change the scope or mandate" of § 303.190, *Respondent's Substitute Brief* at 18, misunderstands what occurred. While the language of that section did not change, when the law became effective in 1987, automobile

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insurance went from voluntary to mandatory. And as pointed out in Ms. Steele's initial Brief, because of that change, the "freedom of contract" that guided courts before 1987 no longer existed. The position the insurance company takes on this issue is contrary to almost every court in this state (and other states, as discussed below) that has evaluated the impact of that amendment. This Court has been clear:

> The plain purpose [of the MVFRL] is to make sure that people who are injured on the highways may collect damage awards, within limits, against negligent motor vehicle operators. This protection extends to occupants of the insured vehicle as well as to operators and occupants of other vehicles and pedestrians.

Halpin v. American Family Mut. Ins. Co., 823 S.W.2d 479, 482 (Mo. banc 1992).

Turning to the issue specific to this case, in discussing "use" in the context of the MVFRL, it seems at times that one can go down the rabbit hole in analyzing these cases. As the insurance company has jumped in by relying heavily on *State Farm Mut. Auto. Ins. Co. v. Carney*, 861 S.W.2d 665 (Mo. App. 1993), Ms. Steele will follow it in.

Carney would normally merit little discussion, as it was a case decided solely on the language of the insurance policy. What makes it interesting, though, is that in its discussion of "use," it relied on *Allstate Ins. Co. v. Hartford Acci. & Indem. Co.*, 486 S.W.2d 38 (Mo. App. 1972). *Allstate* was, inexplicably, ignored by *Waltz*, though it considered the same issues.

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In *Allstate*, a "second permittee" case,[1] there was an extensive discussion of the difference between "operate" and "use" in the context of a liability clause in the policy. In this case, Molly Girvin had received permission to "use" her mother's car, who then turned around and gave permission to Gordon Humphrey to "operate" (drive) the car. The issue was whether Gordon Humphrey had permission to "operate" the vehicle under the omnibus clause[2].

The court without equivocation found that Molly, as a passenger in the vehicle at the time, was "using" the vehicle, as opposed to Gordon, who was "operating" it. *Id.* at 44. This is not a particularly surprising result, as the broad reading of "use," particularly in the context of the omnibus clause, is generally accepted across the country. *See* Appleman, 6C INSURANCE LAW AND PRACTICE § 4354 at 62-8. What is more important for our purposes, though, is the realization that "using" a vehicle for purposes of liability coverage goes beyond the exercise of simply trying to figure out whether someone can be sued and covered by the policy. It has implications for other parts of the liability policy as

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[1] Whether an operator of a vehicle has implied permission because the operator received permission from a third person who received permission from the named insured.

[2] An omnibus clause in an insurance policy is the clause that purports to define the permissive users of a vehicle.

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well, and again, the insurance company here attempts to place an unnecessary restriction on the word that just does not exist.

Though the insurance company asserts "forty years" of case law, there are in fact only two cases that have interpreted § 303.190 in the context of a passenger "using" a vehicle: *Byers v. Shelter Mut. Ins. Co.*, 271 S.W.3d 39 (Mo. App. 2008), and *Marchand v. Safeco Ins. Co.*, 2 S.W.3d 826 (Mo. App. 1999). Both these cases were discussed extensively in Appellant's Substitute Brief. Based on the insurance company's response, though, some amplification of the discussion of *Marchand* is necessary. The point is not whether the cases cited by Ms. Steele in her Brief were relevant to the larger issues in this appeal; the discussion in the Brief of *Marchand*, instead, revolved around the underlying rationale of *Marchand*:

> The MVFRL applies to owners and operators of motor vehicles. As such, Safeco is not required to afford Marchand, a passenger, uninsured motorist coverage.

2 S.W.3d at 830. The *Marchand* court provided no citation for this statement, and the argument made in Ms. Steele's Brief is that this statement is incorrect. And, if this statement is incorrect, then there is no basis for *Marchand*'s *dicta* that passengers are not covered under the MVFRL.

The Supreme Court of Iowa faced a similar question, and found coverage. *Lee v. Grinnell Mut. Re. Co.*, 646 N.W.2d 403 (Iowa 2002). In *Lee*, the court faced a similar statutory scheme, with the notable exception that Iowa requires

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underinsured motorist (UIM) coverage as well as uninsured motorist (UM) coverage. In this UIM case, the Iowa Supreme Court, in analyzing the same requirements in the statute with similar language, found the requirement that liability coverage must be extended to all those "using" the vehicle also required UIM coverage for passengers. *Id.* at 410.

The Supreme Court of Arkansas made a similar analysis, *First Sec. Bank v. John Doe 1, 2, & 3*, 760 S.W.2d 863 (Ark. 1988), as did the Minnesota Supreme Court, *Kaysen v. Federal Ins. Co.*, 268 N.W.2d 920 (Minn. 1978). The Minnesota Supreme Court put it first and best:

> If insurers are allowed to designate a separate and smaller category of persons insured under uninsured motorist coverage, then the broad-based protection which the legislature intended to require could be contractually restricted at the whim of insurers.

268 N.W.2d at 924-925.

CONCLUSION

The inescapable fact is that if the tortfeasor here had liability insurance, by law that insurance would be available to satisfy a potential damage award, within limits, for Justin's injuries. Because the tortfeasor was uninsured, the insurance company argues no such recompense is available. Public policy as set forth by the Missouri General Assembly and this Court has made it clear that is the wrong result. Therefore, this Court should reverse the judgment in favor of the insurance company, and remand this matter to the trial court.

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CERTIFICATE OF COMPLIANCE

David Knieriem, the undersigned attorney for Plaintiff/Appellant, hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Appellant's Brief:

1. Complies with Missouri Supreme Court Rule 55.03,
2. Complies with the limitations contained in Missouri Supreme Court Rule 84.06(b),
3. Contains 1,764 words, and 194 lines, excluding the cover page, according to the word count toll contained in Microsoft Word software with which it was prepared,
4. Contains zero lines of monospaced type in the brief (including Points Relied On, footnotes, signature blocks and cover page),
5. The file of this Appellant's Brief has been scanned for viruses and to the best knowledge, information, and belief of the undersigned, it is virus-free.

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Certificate of Service

A copy of the foregoing was filed in the electronic case management system this 28th day of September, 2012 to be served on the parties through that system.

/s/ David C Knieriem